No. 04-789

FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN ADI,

Petitioner,

v.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY OF AMERICA; DAN BROWN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS, TEXAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the Court of Appeals for the Fourteenth District of Texas violate Texas statutory law or the United States Constitution by affirming the summary judgment granted to Respondents in the defamation lawsuit brought by Petitioner in Texas state court?

DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Prudential Property and Casualty Insurance Company of America respectfully submits the following disclosure statement:

LM Property and Casualty Insurance Company, formerly known as Prudential Property and Casualty Insurance Company of America, is wholly owned by Liberty Mutual Insurance Company, an indirect, wholly-owned subsidiary of Liberty Mutual Holding Company Inc., a Massachusetts mutual holding company whose equity rights are held by the policyholders of various of its subsidiary insurance companies.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Prudential Property and Casualty Insurance Company of America ("Prudential") and Dan Brown ("Brown")[1] respectfully submit that the Petition for Writ of Certiorari filed by Petitioner John Adi ("Petitioner") should be denied.

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[1] Prudential and Brown are referred to collectively as "Respondents."

INTRODUCTION

Petitioner seeks review of a December 11, 2003 decision from the Court of Appeals from the Fourteenth District of Texas ("the Fourteenth Court of Appeals"), an intermediate appellate court, that affirmed the summary judgment granted to Respondents in the defamation lawsuit brought by Petitioner in the 61st State District Court of Harris County, Texas. Petitioner does not seek review of the Texas Supreme Court's denial of his petition for review of the Fourteenth Court of Appeals' decision. Rather, Petitioner seeks review of the Fourteenth Court of Appeals' decision on constitutional grounds not asserted in his petition for review to the Texas Supreme Court; in connection with the Fourteenth Court of Appeals' interpretation of Texas laws, rules and statutes; and because he alleges the Fourteenth Court of Appeals' decision conflicts with decisions from the Fifth Circuit Court of Appeals that do not involve federal questions.

JURISDICTION

Respondents assert that this honorable Court lacks jurisdiction over the instant case, as (1) Petitioner's pleading in this Court is based in part on constitutional grounds not properly asserted in the Texas Supreme Court; (2) Petitioner improperly seeks a determination that the intermediate Texas appellate court improperly interpreted or applied a Texas statute or procedural rule; and (3) Petitioner improperly seeks a determination that the intermediate Texas appellate court's opinion conflicts with decisions issued by the Fifth Circuit Court of Appeals on matters that do not involve federal questions. For these reasons, this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider Petitioner's petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner -- who is currently incarcerated at the Texas Department of Criminal Justice, Institutional Division -- and a Texas attorney were the subject of an investigation by the Texas Department of Insurance. (Pet. App. "A"). In this regard, at the request of the Texas Department of Insurance, Respondents issued a pretext insurance policy for use by the Texas Department of Insurance in conducting a sting operation ("the sting"). (Pet. App. "A"). Following the sting, Petitioner was arrested and convicted of "engaging in organized criminal activity," a second-degree felony. (Pet. App. "A"). He was sentenced to seventy years' imprisonment in the Texas Department of Criminal Justice, where he currently resides. (Pet. App. "A").

Petitioner sued Respondents for defamation in connection with a claims note prepared by Brown to explain to other Prudential employees the pretext policy created for the sting. (Pet. App. "A"). Brown stated in the note that Petitioner had been arrested in connection with the sting on January 29, 1998, and that he had been charged with insurance fraud, a third-degree felony. (Pet. App. "A"). Put simply, Brown misidentified the date of Petitioner's arrest and *understated* the degree of felony with which Petitioner had been charged. (Pet. App. "A").[2]

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[2] In Texas, a third-degree felony is a lesser crime than a second-degree felony. TEX. PENAL CODE " 12.04, 12.33, 12.34.

Respondents moved for summary judgment on the grounds that the statements were substantially true, and that Petitioner had not been injured by them. (Pet. App. "A"). The trial court granted Respondents' summary judgment motion and the Fourteenth Court of Appeals affirmed. (Pet. App. "A"). Although Petitioner raised eight issues on appeal, Petitioner did not raise any constitutional arguments in the Fourteenth Court of Appeals. (Pet. App. "A"). The Fourteenth Court of Appeals affirmed the trial court's ruling and denied Petitioner's motion for rehearing. (Pet. App. "A"). Subsequently, Petitioner filed motions for rehearing and to correct the judgment, both of which the Fourteenth Court of Appeals denied. (Resp. App. "A" at attachments "B" and "C"). Petitioner filed a petition for review with the Texas Supreme Court but did not raise any constitutional arguments. (Resp. App. "A"). The Texas Supreme Court denied the petition for review. (Pet. App. "C"). Petitioner filed a motion for rehearing, which the Texas Supreme Court denied. (Pet. App. "D").[3]

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[3] Although Petitioner's motion for rehearing to the Texas Supreme Court presented a vague due-process argument, Respondents contend Petitioner waived the constitutional argument by failing to present it to the Texas Supreme Court in his petition for review.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

As a preliminary matter, this Court lacks jurisdiction over the petition for writ of certiorari. First, inasmuch as Petitioner failed to assert a constitutional argument in Texas' intermediate appellate courts or in his petition for review to the Texas Supreme Court, Petitioner's constitutional argument is not properly before this Court. Second, Petitioner improperly seeks review of a state court's interpretation of Texas statutes and rules. Third, Petitioner improperly seeks review of a Texas appellate court's decision that is devoid of any federal question. That is, the Fourteenth Court of Appeals' opinion does not address or implicate federal law, treaty or the United States Constitution.

Notwithstanding the numerous jurisdictional defects in the petition for writ of certiorari, Petitioner's substantive argument lacks any merit whatsoever, because he was not defamed, as the Texas courts properly found.

I. Misstatements in the Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 15(2), Respondents note the following misstatements in Petitioner's Petition for Writ of Certiorari.

Petitioner incorrectly states that the Fourteenth Court of Appeals' memorandum opinion affirming the summary judgment granted in Respondents' favor contained "material misstatements" of facts. On the contrary, any misstatements in the Fourteenth Court of Appeals' opinion were simply typographical errors that were not material and did not change the "substantial truth" analysis used in affirming the lower court's ruling. Moreover, any purported misstatements did not, and could not change the ultimate determination that the allegedly defamatory statement only *understated* the seriousness of the felony with which Petitioner was charged and for which he was convicted.

In addition, Petitioner incorrectly states that the Fourteenth Amendment of the United States Constitution is implicated in the instant litigation in light of the Fourteenth Court of Appeals' overruling of Petitioner's motions for rehearing and to correct the judgment.[4] This meritless assertion is nothing more than a thinly-veiled attempt to confer jurisdiction on this Court where none exists. Indeed, Petitioner fails to

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[4] As noted above, Petitioner failed to assert this (or any other) constitutional argument in his petition for review to the Texas Supreme Court.

explain how his rights were allegedly violated, other than pointing to a typographical error that had no bearing on the Court's decision.

Petitioner also incorrectly states that the Fourteenth Court of Appeals' decision conflicts with decisions from the United States Court of Appeals for the Fifth Circuit. This argument lacks merit as well, as the cases he cites are not in conflict with the Fourteenth Court of Appeals' decision. Moreover, even if the cases were in conflict – which they are not – such conflict would not create jurisdiction in this Court because the Fourteenth Court of Appeals did not address a federal law, statute, treaty or any legal principle that would give rise to a federal question. *See* Sup. Ct. R. 10(c).

II. Petitioner did not preserve his right to appeal on constitutional grounds, and the Fourteenth Court of Appeals did not deprive Petitioner of his due process rights in any event.

Petitioner complains that the Fourteenth Court of Appeals' refusal to grant his motion for rehearing or to correct the judgment violated the Fourteenth Amendment's due process clause. *See* Petition at 9. Petitioner did not raise his due process argument, however, in his motions for rehearing and to correct the judgment in the Fourteenth Court of Appeals, or in his petition for review to the Texas Supreme Court. (Resp. App. "A" and attachments "B" and "C" thereto). As such, Petitioner has waived his right to present a due process argument to this Court. *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (Supreme Court cannot consider state court case unless federal question was both raised and decided in state court below). *See also Monks v. New Jersey, N.J.*, 398 U.S. 71 (1970) (Having failed to assert a constitutional argument in the lower court, petitioner was not entitled to assert his constitutional argument for the first time in his petition for writ of certiorari to United States Supreme Court); *Howell v. Mississippi*, No. 03-9560, 2005 U.S. Lexis 1371, *5 (U.S. Jan. 24, 2005) (citing cases) (same).[5]

Assuming, *arguendo* that Petitioner did preserve his right to assert a due process argument in this Court, Petitioner's petition for writ of certiorari should be denied because his due process argument is wholly without merit. Petitioner has not cited a single case

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[5] *See supra*, note 3.

construing the Constitution - or any other authority, for that matter - to support his contention that his due process rights were violated or to explain in what manner said rights were (allegedly) violated. Finally, Petitioner's argument regarding the import of a single typographical error, which he asserts gives rise to his due process argument, is belied by the remaining text of the appellate opinion of which he complains.

By way of explanation, it is undisputed that Petitioner was arrested on March 9, 1998 on charges of engaging in organized criminal activity. Bearing that in mind, Petitioner complains of a typographical error on page 7 of the Fourteenth Court of Appeals' decision, where Respondents' summary judgment evidence was discussed:

> ...The indictment showed that on January 13, *1998*, Adi was charged with engaging in organized criminal activity.... The capias showed that Adi was arrested on March 9, 1998, for the charged offense, and the judgment provided the details of his conviction and sentencing.

Pet. App. "A" at 7 (emphasis added). Although the indictment was actually dated January 13, 1999, the discrepancy is of no matter, because, *inter alia*, the date that Petitioner was *indicted* or *charged* was never the subject of the claims note or of the resulting defamation lawsuit. Pet. App. "A" at 2. Rather, the instant litigation stemmed from the reference in the claims note of the date of the *arrest* and the type of offense with which Petitioner was charged at that time. *Id.*

Indeed, as enumerated above, the sentence after the one upon which Petitioner bases his due process argument contains the correct date of arrest and refers to the charge that was actually brought against him. Pet. App. "A" at 7. The remaining text of the opinion reflects the correct dates and contains accurate explanatory information, as well. For instance, the appellate opinion explains the crux of Petitioner's claims in the second paragraph:

> In the [claims] note, Brown stated that Ai was arrested in connection with the sting operation on January 29, 1998, and charged with insurance fraud, a third-degree felony. In fact, Adi was arrested at a later date and was charged with "engaging in organized criminal activity," a second-degree felony.

Pet. App. "A" at 2. The court subsequently stated

> The claims note misstated the date of Adi's arrest and the exact offense charged, but these errors do not change the fact that Adi was arrested and, in fact, convicted of a more serious felony than described in the claims note....Consequently, the statements could not have been more damaging to Adi's reputation, in the mind of the average reader, than Adi's arrest and conviction for engaging in organized criminal activity, especially since the criminal activity - an insurance fraud

> scheme – was significant enough to the be target of a sting operation.

Pet. App. "A" at 8. Clearly, the typographical error of which Appellant complains cannot be assigned any import in light of the Court's obvious grasp of the salient issues and dates.

There is, simply put, no logical basis for the assertion that the typographical error in question resulted in an erroneous opinion or deprived Petitioner of his due process rights. Therefore, the petition for writ of certiorari should be denied.

III. The Texas Supreme Court is the ultimate authority on Texas law.

Petitioner incorrectly asserts his petition should be granted because the Fourteenth Court of Appeals "misconstrued or misapplied" section 73.005 of the Texas Civil Practice and Remedies Code and Rule 166a(c) of the Texas Rules of Civil Procedure. (*See* Petition at 7-8). Notwithstanding the appellate court's proper application of Texas' Civil Practice and Remedies Code and Rules of Civil Procedure, Petitioner has failed to state a basis for this Court to grant his petition.

The jurisdiction of the United States Supreme Court is described in Title 28 of the United States Code at chapter 81. 28 U.S.C. § 1251, *et seq.* Within chapter 81, section 1257 describes the only circumstances in which the U.S. Supreme Court has jurisdiction over litigation that originated in a state court:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the

> treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). Petitioner does not assert the Fourteenth Court of Appeals' decision interpreted or applied section 73.005 of the Texas Civil Practice and Remedies Code or Rule 166a(c) of the Texas Rules of Civil Procedure in such a way as to be repugnant to the Constitution or any federal treaty or law. Nor does Petitioner assert that the Fourteenth Court of Appeals' decision draws into question the validity of a United States statute or treaty. Rather, Petitioner merely seeks an avenue to complain about the Texas courts' rulings on his unfounded claims, each of which was grounded in Texas law.

It is well-settled that the Texas Supreme Court is the final authority on Texas law when no federal question is implicated. *See, e.g., Harris County v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 316 (5th Cir. 1999). *See also Haught v. MacEluch*, 681 F.2d 290, 296 (5th Cir. 1982), citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("[T]he State's highest court is the best authority on its own law."). Therefore, Petitioner's (incorrect)[6] assertion that the Fourteenth Court of Appeals' opinion incorrectly applied or interpreted Texas rules and/or law is not properly before this Court, and his petition for writ of certiorari should be denied.

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[6] Respondents assert that the Fourteenth Court of Appeals properly applied the Texas law and rules in question.

IV. The Fourteenth Court of Appeals' decision does not conflict with opinions from the Fifth Circuit, but even if it did, review by this Court would not be proper.

Petitioner also urges this Court to grant his petition for writ of certiorari by asserting that the Fourteenth Court of Appeals' opinion conflicts with cases decided by the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). *See* Petition at 8-9. Here, again, Petitioner's assertion is incorrect but, even if it were not, this Court would not have jurisdiction under 28 U.S.C. 1257(a) to hear the instant matter on the grounds asserted.

As set forth above, a state court appellate opinion cannot be reviewed unless a federal question is implicated. That is, the opinion at issue must call into question a federal law or treaty; must involve a state law that conflicts with the United States Constitution, laws or treaties; or must affect privileges provided under federal law. 28 U.S.C. § 1257(a). There is simply no jurisdiction conferred on this Court by the mere fact that a state appellate decision conflicts with a federal appellate decision in the absence of a conflicting holding on a federal question. *Id.* *See also* SUP. C. R. 10(a).

Such is not the case at bar. On the contrary, the federal opinions Petitioner cites do not conflict with the Fourteenth Court of Appeals opinion.[7] Assuming,

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[7] For example, *Conticommodity Servs., Inc. v. Ragan*, 63 F.3d 438, 442 (5th Cir. 1995) is not applicable

to the instant case for myriad reasons. Petitioner erroneously interprets *Conticommodity* to mean that any records that reflected the date of his arrest and the crime with which he was charged were inadmissible while his conviction was on appeal. *See* Petition at 8. Petitioner is mistaken because the statements at issue in *Conticommodity* were made in the context of characterizing the defamation plaintiff as a dishonest person or criminal, and for no other reason. 63 F.3d at 441-42. Significantly, the trial court granted summary judgment because the defamation plaintiff's "criminal *conviction* eliminate[ed] any genuine issue of material fact regarding the issue of truth" as to his criminal nature. *Id.* at 442 (emphasis added). On appeal, the Fifth Circuit held the summary judgment in favor of the defamation defendants should not have been granted on the sole basis of the conviction, which was on appeal at the time (and which ultimately was reversed). *Id.* However, the Fifth Circuit affirmed the summary judgment on other grounds. *Id.*

In contrast, the allegedly defamatory statements of which Petitioner complains in the instant litigation did not pertain to his ultimate conviction (as did the allegedly defamatory statements in *Conticommodity*) but, rather, involved the *date* of his arrest and the *type* of offense with which he was charged. (Pet. App. "A"). The statements were made to explain the pretext policy created for the sting that involved Petitioner. *Id.* The fact that Petitioner's *conviction* was on appeal during his defamation litigation has no bearing on the appellate court's holding that the substantial truth of the statements regarding his arrest date and the degree

arguendo, the federal decisions did conflict in some manner with the Fourteenth Court of Appeals' opinion, such conflict would still not confer jurisdiction on this Court because the Fourteenth Court of Appeals did not address a single federal question. Accordingly, any conflict between the opinion and the Fifth Circuit cases could not possibly relate to a federal question.

Here again, on its face, Petitioner's argument fails to confer jurisdiction on this Court. *See* 28 U.S.C. § 1257(a). Moreover, Petitioner's argument is simply wrong, as the cases are not in conflict.

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of offense with which he was charged entitled Respondents to summary judgment. *Id.* In other words, the appeal of his conviction did not change the date Petitioner was arrested or the type of crime with which he was charged in response to the insurance fraud sting. As such, *Conticommodity* is wholly distinguishable and inapplicable.

In addition, Petitioner inexplicably contends the Fourteenth Court of Appeals' decision conflicts with *Cranberg v. Consumers Union of U.S., Inc.*, 756 F.2d 382 (5th Cir. 1985), but Respondents disagree. *See* Petition at 9. Indeed the *Cranberg* court noted that "Texas law holds substantial truth is a defense to a libel claim." 756 F.2d at 390 (citing cases).

V. There is no valid reason for certiorari to be granted in this case.

There is no compelling reason to grant Petitioner's petition for writ of certiorari. The decision of which Petitioner complains was not issued by a United States Court of Appeals in such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. SUP. CT. R. 10(a). The decision was not an important federal question determined by state court of last resort in such way as to conflict with the decision of another state court of last resort or with a United States Court of Appeals. SUP. CT. R. 10(b). Nor has the Fourteenth Court of Appeals (or the Texas Supreme Court, for that matter) decided an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c).

Any suggestion to the contrary by Petitioner is without legal or factual basis.

CONCLUSION

For the foregoing reasons, Respondents Prudential Property and Casualty Insurance Company of America and Dan Brown submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

JOHN ADI
PLAINTIFF - APPELLANT - PETITIONER

VS.

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
DEFENDANTS - APPELLEES - RESPONDENTS

ON APPEAL FROM THE
FIRST APPELLATE DISTRICT
COURT OF APPEALS
HOUSTON, TEXAS
01-03-00063-CV

APPELLANT'S PETITION FOR REVIEW

JOHN ADI
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PETITIONER PRO SE

IDENTITY OF PARTIES AND COUNSEL

PURSUANT TO TEX. R. APP. ANN. 38.1(a) (VERNON PAMPH - 2000), THE FOLLOWING PERSONS ARE INTERESTED PARTIES:

(1) PRESIDING JUDGE AT TRIAL

HON. JOHN DONOVAN
61st DISTRICT COURT
HOUSTON, TEXAS 77002

(2) APPELLEES - RESPONDENTS

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. A SUBSIDIARY OF THE PRUDENTIAL INSURANCE OF AMERICA
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STATEMENT OF THE CASE

PETITIONER, JOHN ADI SUED FOR DAMAGES, RESPONDENTS, DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA FOR DEFAMATION OF CHARACTER (SLANDER PER SE) ARISING OUT Of STATEMENTS MADE BY DAN BROWN ON JANUARY 30, 1998 CONCERNING PETITIONER TO TWO OTHER PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY EMPLOYEES. DAN

BROWN MADE THE STATEMENTS IN COURSE AND SCOPE OF HIS EMPLOYMENT AS A PRUDENTIAL EMPLOYEE.

RESPONDENTS, DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY MOVED FOR SUMMARY JUDGEMENT, WHICH HAS GRANTED BY THE TRIAL COURT ON SEPTEMBER 19, 2002 BY HON. JOHN DONOVAN OF THE 61st JUDICIAL DISTRICT COURT OF HARRIS COUNTY. PETITIONER APPEALED THE JUDGEMENT TO THE FIRST COURT OF APPEALS. THE PARTIES WAIVED ORAL ARGUMENT. APPEAL HAS SET FOR HEARING BY SUBMISSION BEFORE JUSTICES TIM TAFT, GEORGE C. HANKS, AND JANE BLAND OF THE FIRST COURT OF APPEALS.

THE FIRST COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT AND FILED MEMORANDUM OPINION ISSUED ON JULY 01, 2004 BY HON. JUSTICE TIM TAFT IN CAUSE NO. 01-03-00063-CV; JOHN ADI VS. DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SEE APPENDIX "A".

PETITIONER FILED MOTION FOR REHEARING WHICH THE FIRST COURT OF APPEALS DENIED ON AUGUST 26, 2004 SEE APPENDIX "B". PETITIONER, JOHN ADI NOW FILES THIS PETITION FOR REVIEW ASKING THIS COURT

TO REVIEW FIRST COURT OF APPEALS JUDGEMENT.

STATEMENT OF JURISDICTION

PETITIONER, JOHN ADI SEEKS REVIEW OF THE JUDGEMENT OF THE FIRST COURT OF APPEALS ISSUED ON JULY 01, 2004. APPENDIX A. THAT JUDGEMENT AS REFLECTED BY THE MEMORANDUM OPINION OF THE COURT OF APPEALS ISSUED BY JUSTICE TIM TAFT (APPENDIX A) ON JULY 01, 2004 AFFIRMED TRIAL COURTS JUDGEMENT THAT HAS ON APPEAL. THE COURT OF APPEALS IN RENDERING ITS JUDGEMENT COMPLETELY OVERLOOKED THE DATE THE STATEMENTS THAT WAS THE CENTER OF THE SUIT WAS PUBLISHED AND AFFIRMED THE TRIAL COURTS JUDGEMENT BASED ON CRIMINAL CONVICTION THAT OCCURED MORE THAN A YEAR AFTER THE PUBLICATION IN QUESTION THAT WAS ON APPEAL AT THE TIME OF BOTH TRIAL AND COURT OF APPEALS JUDGEMENT. THIS COURT HAS JURISDICTION PURSUANT TO TEXAS GOV'T CODE, SEC 22.001(a)6 TO REVIEW THE JUDGEMENT OF THE COURT OF APPEALS IN THIS CASE BECAUSE THE FIRST COURT OF APPEALS IN THE INSTANT CASE HAS COMMITTED AS ERROR OF LAW, AND THAT ERROR IS OF SUCH IMPORTANCE TO THE JURISPRUDENCE OF THE STATE THAT IT REQUIRES CORRECTION. THIS ERROR WAS NOT COMMITTED IN A CASE WITHIN THE FINAL JURISDICTION OF THE FIRST COURT OF APPEALS.

THIS COURT ALSO HAS JURISDICTION PURSUANT TO TEXAS GOV'T CODE 22.001(a)(2) BECAUSE THE FIRST COURT OF APPEALS IN THIS CASE HAS HELD DIFFERENTLY FROM PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

ADDITIONALLY THIS COURT HAS JURISDICTION TO REVIEW THIS CASE BECAUSE THE FIRST COURT OF APPEALS DECISION IN THE INSTANT CASE CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT SEE MAYHEW VS. CAPRITO, 749 S.W.2d 1,2 (TEX. 1990).

ISSUES PRESENTED

(1.) WHERE A PLAINTIFF IN A CIVIL ACTION FILES A MOTION FOR LEAVE OF COURT TO FILE A RESPONSE TO A DEFENDANTS MOTION FOR SUMMARY JUDGEMENT AND THE RECORD BEFORE THE COURT OF APPEAL CONTAINS TRIAL COURTS ORDER DENYING PLAINTIFFS MOTION AND A TRIAL COURTS SUMMARY JUDGEMENT ORDER IN FAVOR OF THE DEFENDANTS THAT DID NOT INDICATE THAT THE TRIAL COURT CONSIDERED OR DID NOT CONSIDER PLAINTIFFS RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT, ON APPEAL OF THE TRIAL COURTS ORDER DENYING PLAINTIFFS MOTION FOR LEAVE TO FILE RESPONSE, IS IT PROPER FOR AN APPELLATE COURT UPON FINDING THAT PLAINTIFFS MOTION HAS TIMELY FILED TO OVERRULE PLAINTIFFS APPEAL OF THE TRIAL COURTS

ORDER ON THE GROUND THAT NOTHING IN THE RECORD INDICATES THAT THE TRIAL COURT DID NOT CONSIDER PLAINTIFFS RESPONSE BEFORE GRANTING DEFENDANTS SUMMARY JUDGEMENT MOTION? DID THE FIRST COURT OF APPEALS ERR IN OVERRULING PETITIONER'S APPEAL OF TRIAL COURTS DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT?

(2.) WHETHER THE FIRST COURT OF APPEALS PROPERLY APPLIED TEX.R. EVID. RULE 803(8), 803(22), AND 902(1)(4) WHEN IT OVERRULED PETITIONERS APPEAL CONTESTING TRIAL COURTS ADMISSIBILITY AND AUTHENTICITY OF RESPONDENT'S SUMMARY JUDGEMENT EVIDENCE EXHIBITS F AND G WHEN AFFIRMING TRIAL COURTS JUDGEMENT.

(3.) WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS ADMISSIBLE. UNDER TEX. R. EVID. 803(8).

(4.) WHETHER THE COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT ON PETITIONERS DEFAMATION ACTION BASED ON PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS PROPER.

(5.) WHETHER UNDER TEXAS LAW, DOES A CRIMINAL CONVICTION SATISFY TRUTH INQUIRY IN A CIVIL ACTION FOR DEFAMATION.

(6.) WHETHER IN LIGHT OF THE SUMMARY JUDGEMENT EVIDENCE, THE FIRST COURT OF APPEALS ERRED IN FINDING THAT RESPONDENT WERE ENTITLED TO SUMMARY JUDGEMENT ON THE BASIS OF SUBSTANTIAL TRUTH AND THAT TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGEMENT..

(7.) WHETHER THE FIRST COURT OF APPEALS ERRED IN OVERRULING PETITIONERS APPEAL OF TRIAL COURTS DENIAL OF PETITIONER'S OBJECTIONS AND MOTION TO STRICK RESPONDENT'S SUMMARY JUDGEMENT EXHIBITS.

(8.) WHETHER THE FIRST COURT OF APPEALS ERRED IN ITS FINDING THAT THERE ARE NO GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGEMENT FOR THE DEFENDANT ON APPELLANTS DEFAMATION CASE.

(9.) WHETHER THE FIRST COURT OF APPEALS ERRED IN HOLDING THAT TRIAL COURT DID NOT ABUSE ITS DESCRETION BY DENYING ADI'S MOTION FOR NEW TRIAL.

(10.) WHETHER THE FIRST COURT OF APPEALS DENIED PETITIONER [ADI] DUE PROCESS OF LAW AND EQUAL PROTECTION LAW RIGHT GUARANTED TO HIM UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN IT FAILED TO CONSIDER ALL ARGUMENT RAISED BY PETITIONER IN HIS APPELLATE BRIEF, AND FAILED TO LIMIT THE OBJECTIVE TRUTH INQUIRY ON PETITIONERS DEFAMATION ACTION ON "WHETHER THE STATEMENTS WERE TRUE WHEN MADE." WHEN IT AFFIRMED TRIAL COURTS JUDGEMENT.

STATEMENT OF FACTS

THE COURT OF APPEALS CORRECTLY STATED THE NATURE OF THE CASE HOWEVER PETITIONER JOHN ADI WAS NOT THE SUBJECT OF AN INVESTIGATION AT THE TIME OF THIS INCIDENT AND THE COURT OF APPEALS FAILED TO STATE THAT BROWN MADE THE DEFAMATORY STATEMENTS IN QUESTION TO TWO OTHER INDIVIDUALS ON JANUARY 30, 1998. PETITIONER ADI OFFERS THE FOLLOWING ADDITIONAL FACTS:

RESPONDENT, DAN BROWN ON JANUARY 30, 1998 IN COURSE AND SCOPE OF HIS EMPLOYMENT WITH PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY IN HOUSTON, TEXAS MADE SLANDEROUS STATEMENTS HE ALLEGEDLY RECEIVED FROM ANOTHER INDIVIDUAL FROM AUSTIN, TEXAS CONCERNING PETITIONER TO TWO OTHER

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY EMPLOYEES BASED IN HOUSTON AND HOLMDEL, NEW JERSEY THAT ADI HAS BEEN ARRESTED BY THE FRAUD UNIT ON JANUARY 29, 1998 AND CHARGED WITH INSURANCE FRAUD, A THIRD DEGREE FELONY. PETITIONER LATER UNCOVERED THIS SECRETLY CONCEALED ACT THROUGH DAN BROWN'S ANSWER TO INTERROGATORIES PROPOUNDED BY PETITIONER TO DAN BROWN DURING LITIGATION OF A DIFFERENT LAWSUIT. BASED ON THAT DISCOVERY PETITIONER ON JUNE 14, 2002 FILED THIS LAWSUIT AGAINST DAN BROWN AND HIS EMPLOYER PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. (TS 2-9).

RESPONDENT ON JULY 19, 2002 BEFORE ALLOWING DISCOVERY FILED A MOTION FOR SUMMARY JUDGEMENT IN WHICH THEY ASSERTED AFFIRMATIVE DEFENSE OF SUBSTANTIAL TRUTH, RES JUDICATA, AND LACK OF INJURY. (1st SUPP. TS. 1-53). RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT WAS SET FOR HEARING BY SUBMISSION BEFORE HON. JOHN DONOVAN FOR AUGUST 19, 2002.

PETITIONER FILED HIS RESPONSE AND OBJECTIONS TO RESPONDENTS MOTION FOR SUMMARY (3rd SUPP. P.31-41) ALONG WITH OTHER PLEADINGS THAT INCLUDE: AFFIDAVIT OF JOHN ADI IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT (3rd SUPP. P. 20-30); PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS SUMMARY

JUDGEMENT EXHIBITS (3rd SUPP. TS. P. 10-17}; MOTION FOR LEAVE OF COURT TO FILE PLAINTIFF'S LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT. (TS. 30-32).

TRIAL COURT ON SEPTEMBER 19, 2002 SIGNED SUMMARY JUDGEMENT ORDER IN FAVOR OF THE RESPONDENT'S. (TS. 36), (APPENDIX C); DENIED PETITIONER'S MOTION FOR LEAVE OF COURT TO FILE PLAINTIFFS LATE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT (TS. 32), (APPENDIX D); DENIED PETITIONER'S WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANT'S SUMMARY JUDGEMENT EXHIBITS: (TS. 33). ON OCTOBER 15, 2002 PETITIONER TIMELY FILED HIS MOTION FOR NEW TRIAL (TS.38-102) WHICH THE TRIAL COURT OVERRULED ON NOVEMBER 8, 2002 (TS. 110). PETITIONER ON DECEMBER 6, 2002 APPEALED TO THE FIRST COURT OF APPEALS (TS 141).

ON APPEAL, PETITIONER RAISED NINE ISSUES: (1) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE OF COURT TO FILE PLEADINGS IN RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT; (2) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTIONS AND MOTION TO STRIKE DEFENDANT'S SUMMARY JUDGEMENT EXHIBITS; (3) WHETHER DEFENDANT'S SUMMARY JUDGEMENT EVIDENCE WERE SUFFICIENT TO SUPPORT TRIAL COURT'S JUDGEMENT; (4) WHETHER

DEFENDANT'S WERE ENTITLED TO SUMMARY JUDGEMENT AS A MATTER OF LAW BASED ON DOCTRINE OF RES JUDICATA; (5) WHETHER DEFENDANT'S WERE ENTITLED TO SUMMARY JUDGEMENT AS A MATTER OF LAW BASED ON DEFENSE OF SUBSTANTIAL TRUTH; (6) WHETHER DEFENDANT'S WERE ENTITLED TO SUMMARY JUDGEMENT AS A MATTER OF LAW BASED ON DEFENSE OF LACK OF INJURY; (7) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE OF COURT TO FILE PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION; (8) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL; (9) WHETHER THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGEMENT FOR THE DEFENDANT'S ON APPELLANT'S DEFAMATION CASE.

IN A MEMORANDUM OPINION FILED ON JULY 01, 2004, THE FIRST COURT OF APPEALS OVERRULED ALL PETITIONERS POINT OF ERROR ON APPEAL AND AFFIRMED TRIAL COURTS JUDGEMENT ON GROUND THAT RESPONDENT'S WERE ENTITLED TO SUMMARY JUDGEMENT ON SUBSTANTIAL TRUTH AS A MATTER OF LAW. (APPENDIX A).

UPON REVIEW OF THE COURT OF APPEALS JUDGEMENT, PETITIONER DISCOVERED THAT THE COURT OVERLOOKED THE DATE THE SLANDEROUS STATEMENT WAS MADE AND FURTHER RELIED UPON PETITIONERS 1999

CONVICTION THAT WAS ON APPEAL TO AFFIRM TRIAL COURTS JUDGEMENT.

PETITIONER FILED MOTION FOR REHEARING WHICH THE COURT OF APPEAL DENIED. {APPENDIX A). PETITIONERS PETITION FOR REVIEW IS CURRENTLY DUE IN THIS COURT NOVEMBER 12, 2004. (APPENDIX D). PETITIONER RAISED EACH AND EVERY GROUND FOR REVIEW IN THE COURT OF APPEALS. THE COURT CONSIDERED EACH GROUND ON THE MERIT, AND DECIDED THE SAME ADVERSELY TO PETITIONER.

SUMMARY OF THE ARGUMENT

(1.) THE FIRST COURT OF APPEALS INCORRECTLY AFFIRMED THE TRIAL COURT'S JUDGEMENT, HOLDING THAT THE RESPONDENTS PROVED THE SUBSTANTIAL TRUTH OF BROWN'S STATEMENT AS A MATTER OF LAW, BECAUSE THE AFFIRMANCE WHICH WAS BASED ON PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS IMPROPER.

THERE IS NO STATUTORY OR JURISPRUDENTAL BASIS FOR THE PROPOSITION THAT A CRIMINAL CONVICTION SATISFIES THE TRUTH INQUIRY IN A CIVIL PROCEEDING FOR DEFAMATION UNDER TEXAS LAW PETITIONERS 1999 CONVICTION DID NOT SATISFY TRUTH INQUIRY IN A CIVIL ACTION BY WAY OF

DEFAMATORY STATEMENTS. THE COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT WITH OUT CONSIDERING ALL THE ARGUMENTS AND SETS OF MATERIAL FACTS MADE BY PETITIONER IN HIS APPELLATE BRIEF WAS IMPROPER AND DENIED PETITIONER DUE PROCESS OF LAW RIGHT UNDER THE FOURTEENTH AMENDMENT OF UNITED STATES OF AMERICA. AFFIRMANCE WAS FOR THE WRONG REASON.

(2.) THE COURT OF APPEALS ERRED IN FINDING THAT TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING RESPONDENT'S SUMMARY JUDGEMENT EVIDENCE EXHIBITS F AND G BECAUSE THESE EXHIBITS WERE IMPROPERLY CERTIFIED BY THE DISTRICT CLERK. ADDITIONALLY EXHIBIT "G" WHICH SHOWS PETITIONERS 1999 CRIMINAL CONVICTION WAS INADMISSABLE BECAUSE THE RECORD SHOW THE JUDGEMENT WAS BEING APPEALED AND NOTHING IN THE RECORD INDICATES A MANDATE WAS ISSUED ON THE JUDGEMENT.

(3.) THE COURT OF APPEALS OVERRULING OF PETITIONERS CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT ON GROUND THAT NOTHING IN THE RECORD INDICATES THAT THE TRIAL COURT DID NOT CONSIDER PETITIONERS RESPONSE IS IMPROPER. BECAUSE NO RULE SUGGESTS TRIAL COURT MUST STATE HE DID NOT CONSIDER SUCH RESPONSE. AN ORDER

SIGNED BY TRIAL COURT DENYING SUCH MOTION IS SUFFICIENT TO PROVE HE DID NOT.

ISSUE NUMBER ONE

WHERE A PLAINTIFF IN A CIVIL ACTION FILES A MOTION FOR LEAVE OF COURT TO FILE A RESPONSE TO A DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND THE RECORD BEFORE THE COURT OF APPEALS CONTAINS TRIAL COURTS ORDER DENYING PLAINTIFF'S MOTION, AND A TRIAL COURTS SUMMARY JUDGEMENT ORDER IN FAVOR OF THE DEFENDANT'S THAT DID NOT INDICATE THAT THE TRIAL COURT CONSIDERED OR DID NOT CONSIDER PLAINTIFF'S RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT, ON APPEAL OF THE TRIAL COURTS ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE RESPONSE IS IT PROPER FOR AN APPELLATE COURT UPON FINDING THAT PLAINTIFF'S MOTION WAS TIMELY FILED TO OVERRULE PLAINTIFF'S APPEAL OF THE TRIAL COURTS ORDER ON THE GROUND THAT "NOTHING IN THE RECORD INDICATES THAT THE TRIAL COURT DID NOT CONSIDER PLAINTIFF'S RESPONSE BEFORE GRANTING DEFENDANT'S SUMMARY JUDGEMENT MOTION"?

DID THE FIRST COURT OF APPEALS IN THE INSTANT CASE ERR IN OVERRULING PETITIONERS APPEAL OF TRIAL COURTS DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE

TO RESPONDENTS MOTION FOR SUMMARY *JUDGEMENT?*

STATEMENT OF FACT

RESPONDENT FILED JOINT MOTION FOR SUMMARY JUDGEMENT IN PETITIONERS DEFAMATION LAWSUIT {1st SUPP. TS. 1) HEARING WAS SET FOR AUGUST 19, 2002. PETITIONER FILED HIS MOTION FOR LEAVE OF COURT TO FILE LATE RESPONSE AND OBJECTION TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT (TS. 30-32) ALONG WITH AFFIDAVIT OF JOHN ADI IN RESPONSE TO RESPONDENTS SUMMARY JUDGEMENT {3R SUPP. P. 20); PETITIONER'S WRITTEN OBJECTIONS AND MOTION TO STRIKE RESPONDENT'S SUMMARY JUDGEMENT EXHIBITS. (3rd SUPP. TS. P.10), AND PETITIONER RESPONSE AND OBJECTION TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT. (3rd SUPP. TS P. 31-41),

RESPONDENTS DID NOT FILE ANY OBJECTION TO PETITIONERS MOTION FOR LEAVE TO FILE RESPONSE TO THEIR MOTION FOR SUMMARY JUDGEMENT. TRIAL COURT DENIED PETITIONERS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENT'S SUMMARY JUDGEMENT MOTION. (TS. 321; EXHIBIT D.

ON APPEAL HON. TIM TAFT JUSTICE OF THE FIRST COURT OF APPEALS IN MEMORANDUM OPINION ISSUED ON JULY 01, 2004 (EXHIBIT A) MADE A FINDING THAT PETI-

TIONERS TIMELY FILED HIS RESPONSE AND OBJECTION TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT AND THAT TRIAL COURTS DENIAL OF PETITIONERS MOTION DID NOT NULLIFY PETITIONERS RESPONSE AND FINALLY OVERRULED PETITIONER APPEAL OF TRIAL COURTS DENIAL OF PETITIONERS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENTS SUMMARY JUDGEMENT MOTION ON THE GROUND THAT NOTHING IN THE RECORD INDICATES THAT TRIAL COURT DID NOT CONSIDER PETITIONERS RESPONSE BEFORE GRANTING RESPONDENTS SUMMARY JUDGEMENT MOTION. {EXHIBIT A P. 4-5).

REASON FOR GRANTING REVIEW

THE SUPREME COURT SHOULD GRANT A REVIEW BECAUSE THE FIRST COURT OF APPEAL HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT SHOULD BE, BUT HAS NOT BEEN, RESOLVED BY THE SUPREME COURT. TEX. R. APP. P. 56.1(a)(2).

FURTHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISION OF OTHER COURT OF APPEALS. TEX. R. APP. P. 56.1(a)(2).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

A. CONFLICT WITH DECISION OF OTHER COURTS:

WHEN THE COURT OF APPEALS HELD THAT PETITIONERS RESPONSE TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT WAS TIMELY FILED, AND THAT TRIAL COURTS DENIAL OF SAID MOTION DOES NOT NULLIFY PETITIONERS RESPONSE AND LATER OVERRULED PETITIONERS APPEAL CONTESTING DENIAL OF SAID MOTION ON GROUND THAT NOTHING IN THE RECORD INDICATES THAT TRIAL COURT DID NOT CONSIDER PETITIONERS RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT MOTION CONFLICTS WITH OTHER COURTS OF APPEALS DECISIONS IN THE CASE OF E. B. SMITH CO. V. UNITED FIDELITY AND GUARANTY, 850 S.W. 2d 621, 623 TEX. APP. CORPUS CHRISTI 1993 WRIT DENIED); CLENDENNEN V. WILLIAMS, 896 S.W. 2d 257 (TEX.APP. TEXARKANA 1995), AND ALSO THIS SUPREME COURTS DECISION IN THE CASE OF SIMON V. YORK CRANE AND RIGGING CO. INC., 739 S.W. 2d 795 (TEX. 1987) IN FACT IN EACH OF THOSE CASES INCLUDING THIS SUPREME COURTS CASE THE COURT HAS ALWAYS HELD THAT UNDER RULE 5 AND RULE 1665 a (c) OF TEXAS RULE OF CIVIL PROCEDURE THAT APPELLANT'S RESPONSE PLEADING WERE TIMELY FILED AS WAS HELD BY THE COURT OF APPEAL IN INSTANT CASE HOWEVER IN NONE OF THESE CASES DID THE COURT OVERRULE

APPELLANT'S APPEAL TO TRIAL COURTS DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE TO A DEFENDANT'S SUMMARY JUDGEMENT MOTION AFTER FINDING THAT RESPONSE WAS TIMELY FILED ON GROUND THAT "NOTHING IN THE RECORD INDICATES THAT TRIAL COURT DID NOT CONSIDER APPELLANT'S OR PETITIONERS RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT MOTION.

B. IMPORTANCE OF THE QUESTION PRESENTED:

THE QUESTION PRESENTED TO THIS HONORABLE SUPREME COURT IS OF A MAGNITUDE OF STATE WIDE IMPORTANCE IN THAT THE COURT OF APPEAL IN THE INSTANT CASE HAS CREATED A NEW PRECEDENCE THAT IT IS WITHIN THE LAW TO OVERRULE A LITIGANTS APPEAL OF A TRIAL COURTS ORDER DENYING MOTION FOR LEAVE TO FILE A RESPONSE PLEADING TO MOTION FOR SUMMARY JUDGEMENT DESPITE A FINDING THAT RESPONSE HAS TIMELY ONCE NOTHING IN THE RECORD BEFORE IT DOES NOT INDICATE THAT TRIAL COURT DID NOT CONSIDER THE RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT. IN VIEW OF LARGE LITIGATION WITHIN THE STATE, A GUIDANCE ON THE PART OF THE SUPREME COURT ON THIS QUESTION IS ALSO OF GREAT IMPORTANCE. THIS TYPE OF ISSUE WILL CONTINOUSLY COME UP TIME AFTER TIME IF THIS COURT ALLOWS THIS DECISION BY THE FIRST COURT OF APPEALS TO STAND

WITHOUT THE BLESSING OF THIS HONORABLE SUPREME COURT ON WHETHER THE COURT OF APPEALS DECISION IS LEGALLY RIGHT TO BECOME A LAW WITHIN THE STATE JUDICIARY SYSTEM.

PETITIONER RESPECTFULLY REQUEST THAT THIS HONORABLE SUPREME COURT GRANT REVIEW OF THIS ISSUE.

ISSUE NUMBER TWO

WHETHER THE FIRST COURT OF APPEALS PROPERLY APPLIED TEX. R. EVID. RULES 803(8), 803(22) AND 902(1)(4) WHEN IT OVERRULED PETITIONERS APPEAL CONTESTING TRIAL COURTS ADMISSIBILITY AND AUTHENTICITY OF RESPONDENTS SUMMARY JUDGEMENT EVIDENCE EXHIBITS F AND G WHEN AFFIRMING TRIAL COURTS JUDGEMENT?

STATEMENT OF FACTS

RESPONDENTS MOTION FOR SUMMARY JUDGEMENT WAS SUPPORTED BY DOCUMENTS ATTACHED TO THEIR SUMMARY JUDGEMENT MOTION AS EXHIBITS F AND G (1st SUPP. TS. 4S-S3).

EXHIBIT F CONTAINS TWO DOCUMENTS (1) COPY OF COPY OF ORIGINAL CAPIAS SHOWING PETITIONER, JOHN ADI WAS ARRESTED ON MARCH 9, 1998. (2) SECOND DOCUMENT IS A COPY OF COPY OF ORIGINAL INDICTMENT

RETURNED AGAINST PETITIONER ON JANUARY 1, 1999.

EXHIBIT G CONTAINS TWO PAGE DOCUMENT SHOWING PETITIONER WAS CONVICTED AND SENTENCED FOR THE FELONY OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY ON APRIL 21, 1999, THIS DOCUMENT FURTHER INDICATES THAT AS APPEAL WAS TAKEN ON THIS CONVICTION ON APRIL 21, 1999. THE BACK OF THESE DOCUMENTS BEARS A PHOTO COPY OF THE SEAL OF HARRIS COUNTY DISTRICT CLERKS AND A CERTIFICATION DATE OF "JUNE 04, 1996" PETITIONER MADE SEVERAL OBJECTIONS TO THESE RESPONDENTS EXHIBIT F AND G THAT INCLUDE WRITTEN OBJECTION AND MOTION TO STRIKE THESE EXHIBITS ON GROUND THAT THEY ARE HEARSAY, NOT ADMISSIBLE, IMPROPERLY CERTIFIED, IMPROPERLY AUTHENTICATED, NOT COMPETENT SUMMARY JUDGEMENT EVIDENCE, NOT RELEVANT TO DECIDING THE ISSUE BEFORE THE COURT, THAT ATTEMPTED CERTIFICATION IS PRODUCT OF QUESTIONABLE IRREGULARITIES BY THE HARRIS COUNTY DISTRICT CLERK AND A PRODUCT OF FRAUDULENT ACT (3rd SUPP. TS. 10-17), (3rd SUPP. (TS. 31-41). TRIAL COURT DENIED PETITIONERS OBJECTION (TS 33) AND SIGNED SUMMARY JUDGEMENT ORDER IN FAVOR OF THE RESPONDENTS (TS 36).

ON APPEAL PETITIONER IN HIS POINTS OF ERROR TWO AND THREE (APPELLANTS BRIEF P.8-20) ASSERTED THAT TRIAL COURT ERRED IN

DENYING HIS OBJECTIONS AND MOTION TO STRIKE RESPONDENTS SUMMARY JUDGEMENT EXHIBITS F AND G, AND THAT THESE EXHIBITS F AND G WERE INSUFFICIENT TO SUPPORT TRIAL COURTS JUDGEMENT. PETITIONER RE-ASSERTED SAME REASONS HE ASSERTED IN THE TRIAL COURT ON APPEAL.

THE COURT OF APPEALS IN THEIR MEMORANDUM OPINION (EXHIBIT A) WRITTEN BY JUSTICE TIM TAFT OVERRULED PETITIONERS POINT OF ERROR TWO AND THREE ON GROUND THAT THESE RESPONDENTS EXHIBITS F AND G ARE ADMISSIBLE UNDER TEX. R. EVID. 803(8), THAT UNDER TEXAS RULE OF EVIDENCE RULE 902(1) EXHIBITS F AND G ARE SELF AUTHENTICATING AND THAT CERTIFICATION BY THE DISTRICT CLERK'S OFFICE EVEN THOUGH WITH QUESTIONABLE DATE OF CERTIFICATION CONFORM WITH REQUIREMENTS OF TEX. R. EVID. 902(1)(4) BECAUSE THE RULE DOES NOT SPECIFY THAT THE CERTIFICATION CONTAIN AN ACCURATE DATE AND THERE IS NOTHING IN THE RECORD TO INDICATE THAT THE INCORRECT DATE STAMP WAS THE RESULT OF A FRAUDLENT ACT. (OPINION EXHIBIT A P. 8-9).

REASON FOR GRANTING REVIEW

THE SUPREME COURT SHOULD GRANT A REVIEW BECAUSE THE COURT OF APPEAL HAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPRUDENCE

THAT IT SHOULD BE CORRECTED. TEX. R. APP. PROC. 56.1(a)(5).

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT SHOULD BE, BUT HAS NOT BEEN RESOLVED BY THE SUPREME COURT. TEX. R. APP. PROC, 56.1(a)(6).

ADDITIONALLY THE SUPREME COURT SHOULD GRANT A REVIEW BECAUSE THIS CASE INVOLVES INTERPRETATION OF TEX. R. EVID. RULE 902(1)(4) TO DETERMINE WHETHER UNDER THIS RULE A DISTRICT CLERK'S CERTIFICATION MUST CONTAIN AN ACCURATE DATE AND WHETHER A DISTRICT CLERK'S FALSE STATEMENT REGARDING EXISTENCE OF A DOCUMENT IN HIS OFFICE IN CONNECTION WITH CERTIFICATION OF PUBLIC RECORD VOIDS THE CERTIFICATION OF THE DOCUMENT.

ARGUMENT IN SUPPORT OF GRANTING REVIEW

A. COURT OF APPEAL MISSAPPLIED/ MISINTERPRETED TEX.R. EVID. 902(1),(4), 803(8)

THE FIRST COURT OF APPEALS HELD THAT IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ADMIT EXHIBITS F AND G INTO EVIDENCE AS PUBLIC DOCUMENT EXCEPTION TO HEARSAY RULE UNDER TEX.R. EVID. 803(8), THAT DOMESTIC PUBLIC DOCUMENTS SUCH AS

EXHIBITS F AND G, ARE SELF-AUTHENTICATING UNDER TEX. R. EVID. 902(1), AND THAT DISTRICT CLERK'S CERTIFICATION OF THESE EXHIBITS CONFORM WITH THE REQUIREMENT OF TEX. R. EVID. 902(1),(4) BECAUSE THE RULE DOES NOT SPECIFY THAT THE CERTIFICATION CONTAIN AN ACCURATE DATE (OPINION EXHIBIT A P. 8), WERE BASED ON THE COURT OF APPEALS MISAPPLICATION AMD MISINTERPRETATION OF TEX. R. EVID. 803(8), 902(1),(4).

CONTRARY, RESPONDENTS SUMMARY JUDGEMENT EXHIBITS F AND G ARE COPIES OF COPIES OF ORIGINAL CERTIFIED DOCUMENTS PREPARED BY HARRIS COUNTY CLERK BEARING AT THE BACK A SIGNATURE OF A DEPUTY CLERK, STAMP OF HARRIS COUNTY DISTRICT CLERK, INCLUD NG SEAL OF THE CLERKS OFFICE AND THE DATE OF CERTIFICATION AS JUNE 4, 1996 (1st SUPP. TS. 45-53) PUPORTING TO CERTIFY DOCUMENTS THAT NEVER EXISTED UNTIL 1998 AND 1999, BUT THOSE DOCUMENTS ARE ALL COPIES.

THUS THESE DOCUMENTS ATTACHED AS EXHIBITS F AND G TO RESPONDENTS SUMMARY JUDGEMENT MOTION ARE NOT ADMISSIBLE UNDER TEX. R. EVID. 803(3) NOR SELF AUTHENTICATING UNDER RULE 902(1) OF TEX. R. EVID. RULES 803(3) AND 902(1) APPLIES ONLY TO ORIGINAL DOCUMENTS EXECUTED BY PUBLIC ENTITIES OR OFFICIALS.

FURTHER, THE PURPOSE OF RULE 902(4) OF TEXAS RULE OF EVIDENCE IS TO ALLOW FOR A CERTIFIED COPY OF THE ORIGINAL DOCUMENT TO BE TREATED AS AN ORIGINAL. HOWEVER, ONE OF THE CONDITIONS IS THAT SUCH A COPY MUST BE CERTIFIED AS CORRECT COPY OF ORIGINAL BY THE CUSTODIAN OF THE ORIGINAL RECORD OR BY ANY OTHER PERSON AUTHORIZED TO MAKE THE CERTIFICATION, BY CERTIFICATE COMPLYING WITH PARAGRAPHS (1), (2) OR (3) OF RULE 902 OF TEXAS RULE OF EVIDENCE OR COMPLYING WITH ANY STATUTE OR COURT RULE PRESCRIBED PURSUANT TO STATUTORY AUTHORITY THIS CERTIFICATION REQUIREMENT DEMAND FOR PROPER CERTIFICATION OF THE INTENDED DOCUMENTS.

HERE THE BACK OF THE DOCUMENTS INTRODUCED BY THE RESPONDENTS INTO EVIDENCE AS EXHIBITS F AND G WHICH DOES NT BEAR ORIGINAL SEAL HAS THE FOLLOWING ATTESTATION BY HARRIS COUNTY DISTRICT CLERKS OFFICE:

> "I CHARLES BACARISSE, DISTRICT CLERK OF HARRIS COUNTY, TEXAS CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL RECORD FILED AND OR RECORDED IN MY OFFICE ELECTRONICALLY OR HARD COPY, AS IT APPEARS ON THIS DATE.

WITNESS MY OFFICIAL HAND AND SEAL OF OFFICE THIS JUNE 04, 1996"

CHARLES BACARISSE, DISTRICT CLERK
HARRIS COUNTY, TEXAS
BY (signature) _____DEPUTY"

THE COURT OF APPEALS HELD THAT THIS DISTRICT CLERK'S CERTIFICATION CONSTITUTE PROPER CERTIFICATION AND CERTIFIES THE REQUIREMENT OF TEX. R. EVID, 902(1), (4) BECAUSE THE RULE DOES NOT SPECIFY THAT THE CERTIFICATION CONTAIN AN ACCURATE DATE. CONTRARY, PETITIONER DISAGREE BECAUSE THE CIRCUMSTANCES OF PREPARATION OF THESE DOCUMENTS CAST VERY SERIOUS DOUBT ON THE DOCUMENTS TRUSTWORTHINESS AND INDICATE FRAUDLEHT ACTT.

IN FACT THE HARRIS COUNTY DISTRICT CLERK'S STATEMENT THAT THESE DOCUMENTS ARE TRUE AND CORRECT COPIES OF THE ORIGINALS FILED OR RECORDED IN HIS OFFICE AS IT APPEARS ON JUNE 4, 1996 PURPORTING TO CERTIFY DOCUMENTS THAT ORIGINALLY CAME INTO EXISTENCE BETWEEN 1998 and 1999 NOR COULD NOT HAVE BEEN FILED OR EXISTED IN HIS OFFICE ON JUNE 4, 1996 IS NOTHING MORE THAN FALSE TESTIMONY, THIS FALSE STATEMENT WILL NOT SATISFY THE CERTIFICATION REQUIREMENT OF TEX. R. EVID, 902(1),(4). THE SUPREME COURT SHOULD GRANT

REVIEW TO DECIDE WHETHER THIS TYPE OF CERTIFICATION TESTIMONY COULD SUPPORT RULE 903(1),(4) CERTIFICATION REQUIREMENT.

B. IMPORTANCE OF THE QUESTION PRESENTED:

THIS CASE PRESENTS A FUNDERMENTAL QUESTION REGARDING INTERPRETATION OF TEX. R. EVID. 803(8), 803(22) AND 902(1),(4) TO DETERMINE IF THE COURT OF APPEALS CORRECTLY APPLIED RULES 803(22), 803(8) AND 902(1),(4) OF TEX. R. EVID. IN DECIDING THIS CASE. THIS ISSUE RAISES THE FOLLOWING SUB ISSUES THAT COULD BE RESOLVED BY THIS HONORABLE SUPREME COURT UPON REVIEW.

(1) WETHER A DISTRICT CLERK'S FALSE STATEMENT REGARDING EXISTENCE OF A DOCUMENT IN HIS OFFICE IN CONNECTION WITH CERTIFICATION OF PUBLIC RECORD VOIDS THE CERTIFICATION OF THE DOCUMENT?

(2) WHETHER UNDER RULE 902(1),(4) THERE IS NO REQUIREMENT THAT DISTRICT CLERK'S CERTIFICATION CONTAIN AN ACCURATE DATE?

(3) WHETHER A COPY OF A COPY OF ORIGINAL DISTRICT CLERKS DOCUMENT IS ADMISSIBLE UNDER RULES 803(3), 803(22) AND 902(1), (4) OF TEXAS RULE OF EVIDENCE?

THE QUESTIONS PRESENTED IS OF GREAT PUBLIC IMPORTANCE TO THE STATE WIDE JUDICIAL SYSTEM THAT GUIDANCE ON THESE QUESTIONS IS OF GREAT IMPORTANCE TO ALL LITIGANTS. THE ISSUES IMPORTANCE IS ENHANCED BY THE FACT THAT THE FIRST COURT OF APPEALS HAS SERIOUSLY MISAPPLIED AND MISINTERPRETED RULES 902(1), (4), 803(8) AND IN THE PROCESS CREATED A NEW PRECEDENT THAT EVEN IF A DISTRICT CLERK MAKES A FALSE STATEMENT IN CONNECTION WITH CERTIFICATION OF A DOCUMENT, THAT SUCH FALSE STATEMENT SHOULD BE DISREGARDED UNDER RULE 902(1), (4) CERTIFICATION REQUIREMENT. THE COURT OF APPEALS STATEMENT THAT A DISTRICT CLERK'S FALSE STATEMENT REGARDING EXISTENCE OF A RECORD IN HIS OFFICE SHOULD BE OVERLOOKED BECAUSE UNDER TEX. R. EVID. 302(1),(4) THERE IS NO REQUIREMENT THE DATE BE ACCURATE IS NOT PERSUASIVE AND SOMETHING NEW THAT THAT DESERVES THE SUPREME COURTS REVIEW.

ISSUE NUMBER THREE

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS ADMISSIBLE?

STATEMENT OF FACT

RESPONDENTS SUMMARY JUDGEMENT EVIDENCE INCLUDE EXHIBIT "G" REPRESENTING COPY OF PETITIONERS CONVICTION AND SENTENCE FOR THE OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY 1st SUPP, TS.(50-53), THE JUDGEMENT SHOWS AN APPEAL WAS TAKEN (1st SUPP, TS. 52) COURT OF APPEAL HELD IT HAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ADMIT EXHIBIT "G" INTO EVIDENCE (EXHIBIT A P.8-9)

REASON FOR REVIEW

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPONDENCE, THAT IT SHOULD BE CORRECTED, TEX. R. APP. R. 56.1(a)(5).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

THE COURT OF APPEALS HELD THAT IT WAS NOT AN ERROR FOR TRIAL COURT TO ADMIT INTO EVIDENCE RESPONDENTS SUMMARY JUDGEMENT EVIDENCE EXHIBIT "G" WHICH IS RECORD OF PETITIONERS FELONY CONVICTION. HOWEVER, RULE 803(22) OF TEXAS RULE OF EVIDENCE SPECIFICALLY STATES THAT PENDENCY OF AN APPEAL ON A JUDGEMENT OF A PREVIOUS CONVICTION RENDERS SUCH INADMISSIBLE. SEE TEX. R. EVID. 803(22). THE

JUDGEMENT RECORD ADMITTED INTO EVIDENCE AS RESPONDENTS EXHIBIT "G" WAS INTENDED TO PROVE FACTS CONTAINED ON THOSE DOCUMENTS. SPECIFICALLY TO PROVE PETITIONERS CONVICTION FOR ENGAGING IN ORGANIZED CRIMINAL ACTIVITY. THE JUDGEMENT STATES THAT A NOTICE OF APPEAL WAS GIVEN (1st SUPP. TS.52) BUT DOES NOT SHOW THAT A MANDATE OF AFFIRMANCE WAS ISSUED.

A CONVICTION FROM WHICH AN APPEAL HAS BEEN TAKEN IS NOT CONSIDERED TO BE FINAL UNTIL THE CONVICTION IS AFFIRMED. RUSSELL V. STATE 790 S.W. 2d 655, 657 (TEX. CRIM. APP. 1990) THIS JUDGEMENT REPRESENTED AS EXHIBIT IS NOT ADMISSIBLE. TEX. R. EVID. 803(22).

THE DECISION OF THE COURT OF APPEAL TO ADMIT A PRIOR CONVICTION THAT IS ON APPEAL PRESENTS A FUNDAMENTAL PROBLEM WITHIN THE ENTIRE JUDICIAL SYSTEM DEALING WITH ISSUES REGARDING WHETHER A PRIOR CONVICTION THAT IS ON APPEAL IS ADMISSIBLE. THE IMPACT GOES WELL BEYOND CIVIL LITIGATIONS AND EXTENT TO CRIMINAL PROSECUTION ALL OVER THE STATE.

THIS HONORABLE SUPREME COURT SHOULD GRANT A REVIEW TO CORRECT THIS COURT OF APPEALS DECISION THAT DEPARTED FROM NORMS SET UNDER TEX. R. EVID. 803(22).

ISSUE NUMBER FOUR

WHETHER THE COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT ON PETITIONERS DEFAMATION ACTION BASED ON PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS PROPER.

REASON FOR REVIEW

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS WAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPRONDENCE, THAT IT SHOULD BE CORRECTED. TEX. R. APP. P. 56.1(a)(5).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

PETITIONER SUED RESPONDENTS DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY CONTENDING THAT HE WAS SLANDERED BY MR. BROWN WHEN HE TOLD TWO PRUDENTIAL EMPLOYEES ON JANUARY 30, 1998 THAT PETITIONER ADI HAD BEEN ARRESTED BY THE FRAUD UNIT ON JANUARY 29, 1998 AND CHARGED WITH INSURANCE FRAUD, A THIRD DEGREE FELONY. RESPONDENTS MOVED FOR SUMMARY JUDGEMENT BASED ON SUBSTANTIAL TRUTH DEFENSE, TRIAL COURT GRANTED SUMMARY JUDGEMENT (TS.) PETITIONER APPEALED TRIAL

COURTS JUDGEMENT. RESPONDENTS SUMMARY JUDGEMENT EVIDENCE SHOWED PETITIONER WAS ARRESTED ON MARCH 9, 1998 AND WAS SUBSEQUENTLY CHARGED AND CONVICTED OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY, A SECOND DEGREE FELONY, ON APRIL 21, 1999. (1st SUPP. TS. 51).

THE EVIDENCE FURTHER SHOWS THAT APPEAL WAS TAKEN ON THIS CONVICTION ON APRIL 21, 1999 (1st SUPP. TS. 52).

THE COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT. (EXHIBIT "A") THROUGH THE COURTS MEMORANDUM OPINION ISSUED BY HON. JUSTICE TIM TAFT.

THE COURT OF APPEALS REASONED THROUGH JUSTICE TIM TAFT'S OPINION THAT (1) EVEN THOUGH PETITIONER WAS NOT ARRESTED NOR CHARGED WITH INSURANCE FRAUD *AS* BROWN STATED, THE SUMMARY JUDGEMENT EVIDENCE SHOWED RESPONDENT WAS CHARGED WITH AND CONVICTED OF A SECOND DEGREE FELONY OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY WHICH IS A MORE SERIOUS FELONY. (2) THE STATEMENT WOULD SEEM LESS DAMAGING TO AN AVERAGE LISTINER THAN THE ACTUAL TRUTH, CONSIDERING THAT BROWN CLAIMED PETITIONER WAS CHARGED WITH LESS SERIOUS OFFENSE. (3) AS A RESULT RESPONDENTS PROVED THE SUBSTANTIAL TRUTH OF BROWN'S

STATEMENT AS A MATTER OF LAW. SEE (EXHIBIT A OPINION P. 12-13).

IN SUMMARY THE BASIS EXPRESSED FOR THE JUDGEMENT BY JUSTICE TIM TAFT BOILS DOWN TO (1) PETITIONER ADI'S CRIMINAL CONVICTION SETTLED THE QUESTION OF THE TRUTH OF DAN BROWN'S ALLEGEDLY DEFAMATORY STATEMENTS IN FAVOR OF DAN BROWN AND HIS EMPLOYER PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY; (2) THEREFORE THERE IS NO LONGER A GENUINE ISSUE OF MATERIAL FACT ABOUT THE TRUTH OF THESE STATEMENTS; AND (3) THEREFORE SUMMARY JUDGEMENT IS PROPER.

CONTRARY, THERE IS NO STATUTORY OR JURISPRUDENTS BASIS FOR THE PROPOSITION THAT ADI'S 1999 CRIMINAL CONVICTION ON ENGAGING IN ORGANIZED CRIMINAL ACTIVITY SATISFIES THE TRUTH INQUIRY IN A CIVIL PROCEEDING FOR DEFAMATION REGARDING SLANDEROUS STATEMENTS MADE IN 1998.

THE INESCAPABLE FACT IS THAT THIS 1999 CRIMINAL CONVICTION WAS UNDER APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT AND APPEALS COURT AFFIRMANCE OF TRIAL COURTS JUDGEMENT. AND AS SUCH NOT EVEN ADMISSIBLE TO PROVE ANY FACT REGARDING SUCH CONVICTION. TEX. R. EVID. 808(22). PLAINLY THE COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT FOR THE WRONG REASON.

THE FIRST COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT ON THE BASIS OF ADI'S 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS IMPROPER. UNDER TEXAS LAW, ADI'S CRIMINAL CONVICTION DOES NOT SATISFY TRUTH INQUIRY IN HIS CIVIL ACTION AGAINST DAN BROWN AND HIS EMPLOYER BY WAY OF DEFAMATORY STATEMENT. CONTICOMMODITY SERVICES, INC. V. RAGAN, 63 F. 3d 438, REHEARING DENIED, CERTIORARI DENIED 116 S. CT. 1318, 517 U.S. 1104, 134 L. ED. 2d 471.

IMPORTANCE OF THE QUESTION PRESENTED

THE QUESTION PRESENTED IS OF GREAT IMPORTANCE BECAUSE THE COURT OF APPEALS HAS ERRED IN AFFIRMING A TRIAL COURT'S JUDGEMENT FOR THE WRONG REASON AND FURTHER IMPROPERLY AFFIRMED A TRIAL COURTS JUDGEMENT BASED ON A CONVICTION WHICH WAS UNDER APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT, RELIED ON SAME CONVICTION WHICH WAS UNDER APPEAL TO RENDER ITS JUDGEMENT -WHEN SUCH CONVICTION UNDER APPEAL IS NOT EVEN ADMISSIBLE INTO EVIDENCE TO PROVE THAT JUDGEMENT UNDER TEX. R. EVID. 303(22). DEPARTED FROM NORM THAT OBJECTIVE TRUTH INQUIRY ON DEFAMATION CASE IS ON "WHETHER THE STATEMENTS WERE TRUE WHEN MADE" AND NOT WHAT HAPPENS AFTER THE DATE THE ALLEGED STATEMENTS WERE MADE.

THE ERRORS COMMITTED BY THE COURT OF APPEALS IN THE INSTANT CASE IS OF SUCH IMPORTANCE TO THE JURISPRUDENCE OF THE STATE IT REQUIRES CORRECTION.

THE DECISION OF THE COURT OF APPEALS TO AFFIRM TRIAL COURTS JUDGEMENT BASED ON PETITIONERS CRIMINAL CONVICTION WHICH HAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT HAS CREATED CONFLICTS OR INCONSISTENCIES WITHIN THE STATES COURT OF APPEAL AND CONFLICTS WITH RULINGS OF FEDERAL COURTS, PARTICULARLY THE FIFTH CIRCUIT COURT OF APPEAL IN THE CASE OF CONTICOMMODITY SERVICES, INC. V. RAGAN, 63 F. 3d 438 (5th CIR. 1995).

THE SUPREME COURT SHOULD GRANT A REVIEW IN THIS CASE TO CORRECT ERROR COMMITTED BY THE COURT OF APPEALS IN THIS CASE.

ISSUE NUMBER SIX

WHETHER IN LIGHT OF THE SUMMARY JUDGEMENT EVIDENCE, THE FIRST COURT OF APPEALS ERRED IN FINDING THAT RESPONDENTS WERE ENTITLED TO SUMMARY JUDGEMENT ON THE BASIS OF SUBSTANTIAL TRUTH AND THAT TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGEMENT?

REASON FOR REVIEW

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS IN THE INSTANT CASE HAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPONDENCE, THAT IT SHOULD BE CORRECTED TEX. R. APP. P. 56.1(a)(5).

THE COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS IN DECIDING THIS CASE HAS MISAPPLIED OR DECIDED THIS CASE AGAINST THE MANDATE OF TEXAS STATUTE TEX. CIV. PRAC. AND REM. CODE ANN, §73.005.

THE COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS MISINTERPRETED AND MISAPPLIED THE HOLDING OF THIS SUPREME COURT IN THE CASE 0F McKLAIN V. JACOBS, 794 S.W.2D 14 (TEX. 1990) AD COMPLETELY IGNORED STANDARD SET IN RANDALL'S FOOD MARKET INC. V. JOHNSON, 891 S.W. 2d 640 (TEX. 1995) THAT SHOULD HAVE APPLIED IN THIS CASE.

ARGUMENT IN SUPPORT OF GRANTING REVIEW

PETITIONERS LAWSUIT WAS THAT RESPONDENT DAN BROWN ORALLY TOLD TWO PRUDENTIAL EMPLOYEES THAT PETITIONER ADI HAD BEEN ARRESTED BY THE FRAUD UNIT ON JANUARY 29, 1998 AND CHARGED WITH

INSURANCE FRAUD, A THIRD DEGREE FELONY, (TS. 2-9). IN ESSENSE PETITIONER MADE A CASE-FOR SLANDER PER SE DEFAMATION ACTION. RESPONDENTS MOVED FOR SUMMARY JUDGEMENT ON AFFIRMATIVE DEFENSE OF SUBSTANTIAL TRUTH OF THE ALLEGED STATEMENTS.

RESPONDENTS SUMMARY JUDGEMENT DID NOT PRODUCE ANY EVIDENCE THAT PETITIONER WAS ARRESTED JANUARY 29, 1998 NOR ANY EVIDENCE SHOWING PETITIONER WAS CHARGED WITH INSURANCE FRAUD IN EXISTENCE OF THE JANUARY 30, 1998 THE DATE THE ALLEGED STATEMENTS WERE MADE BY DAN BROWN TO TWO OTHER PRUDENTIAL EMPLOYEES RATHER PRODUCED EVIDENCE SHOWING PETITIONER WAS ARRESTED MARCH 9, 1998 AND CHARGED WITH ENGAGING IN ORGANIZED CRIMINAL ACTIVITY. (1st SUPP. TS. 50-53). TRIAL COURT GRANTED SUMMARY JUDGEMENT (TS. 36)

ON APPEAL FIRST COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT BASED ON RESPONDENTS AFFIRMATIVE DEFENSE OF SUBSTANTIAL GROUND THAT EVIDENCE OF PETITIONERS APRIL 21, 1999 CONVICTION FOR THE FELONY OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY ENTITLED RESPONDENTS TO SUMMARY JUDGEMENT BECAUSE IT IS MORE DAMAGING TO PETITIONER IN THE MIND OF AVERAGE LISTENER THAN THE ACTUAL STATEMENT MADE BY MR. BROWN. IN

OTHER WORDS THAT THE STATEMENT MADE BY BROWN WAS LESS DAMAGING TO PETITIONER, ADI IN THE MIND OF AVERAGE RECEPIENT THAN THE SUMMARY JUDGEMENT OF PETITIONERS APRIL 21, 1999 CONVICTION FOR ENGAGING IN ORGANIZED CRIMINAL ACTIVITY UNDER THE STANDARD SET IN MELLVAIN V. JACOBS, 794 S.W. 3d 14 (TEX. 1990). EXHIBIT "A" OPINION P. 12-13).

THE PROBLEM WITH THIS TYPE OF DECISION IS THAT IT WENT AGAINST THE MANDATE OF TEXAS STATUTE §73.005 THAT MANDATES THAT TRUTH IS AN AFFIRMATIVE DEFENSE TO A DEFAMATION CLAIM. UNDER THIS THE OBJECTIVE TRUTH INQUIRY ON THIS DEFAMATION CASE SHOULD BE ON WHETHER THIS ALLEGED STATEMENT WERE TRUE ON JANUARY 30, 1998 THE DATE THAT THE STATEMENTS WAS MADE. WHEN THE COURT OF APPEALS RELIED ON PETITIONERS 1999 CONVICTION OR SET OF FACTS THAT OCCURED AFTER JANUARY 30, 1998 TO DECIDE THIS CASE IT CROSSED THE LINE AHD RENDERED JUDGEMENT FOR THE WRONG REASON. IN FACT BY DOING SO THE COURT OF APPEALS DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF LAW GAURANTED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. US. CONST. AMEN. XIV. AFTER ALL PETITIONER ARGUED THAT THESE STATEMENTS WERE NOT TRUE OR SUBSTANTIAL TRUE ON JANUARY 29 OR 30 1998.

THE COURT OF APPEALS COMPLETELY MISSINTERPRETED/MISAPPLIED THIS COURTS DECISION IN MELLVAIN V. JACOBS, 794 S.W. 2d 14 (TEX. 1990) IN MELLVAIN A STATEMENT IS NOT SUBSTANTIALLY TRUE IF IN THE MIND OF THE AVERAGE RECIPIENT, IT IS MORE DAMAGING TO THE PLAINTIFF'S REPUTATION THAN A TRUTHFUL STATEMENT WOULD BE. ID. THIS COURT IS MELLVAIN DID NOT STATE THAT THE SUBSTANTIAL TRUTH TEST ANALYSIS SHOULD CONSIDER SET OF FACTS BEYOND THE DATE THE ALLEGED DEFAMATORY STATEMENTS WERE MADE.

ADDITIONALLY THIS COURT IN THE CASE OF RANDALL'S FOOD MARKET INC. V. JOHNSON, 891 S.W. 2d 540 (TEX. 1995) STATES THAT IN A CASE BROUGHT BY PRIVATE INDIVIDUAL THAT LITERAL TRUTH OF THE ALLEGED STATEMENT IS A COMPLETE DEFENSE TO SLANDER .

IN THIS CASE PETITIONER MADE A CASE FOR SLANDER PER SE ACTION, AND THE RESPONDENTS SUMMARY JUDGEMENT DID NOT PRODUCE ANY EVIDENCE TO SUPPORT LITERAL TRUTH OF THE ALLEGED DEFAMATORY STATEMENT HADE BY DAN BROWN ON JANUARY 30, 1998. UNDER THAT STANDARD TRIAL COURT JUDGEMENT AND AFFIRMANCE OF TRIAL COURTS JUDGEMENT IN THIS CASE WAS IMPROPER.

THIS CASE PRESENTS QUESTIONS OF THE INTERPRETATION OF THIS COURTS DECISIONS IN MELLVAIN V. JACOBS, 794 S.W. 2d 14 (TEX. 1990).

TO SEE IF THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD SET BY THIS SUPREME COURT IN THAT CASE IN THIS INSTANT CASE.

THIS QUESTION PRESENTED CALL UPON THE SUPREME COURT TO GRANT A REVIEW IN THIS CASE TO SEE IF THE COURT OF APPEALS IN THE INSTANT CASE CORRECTLY APPLIED OR FOLLOWED THE MANDATE OF THE TEXAS STATUTE TEX. CIV. PRAC. AND REM. CODE §73.005 IN THIS CASE AND TO DECIDE WHETHER THE STANDARD SET UP IN THE CASE OF RANDALL'S FOOD MARKET INC. V. JOHNSON, 891 S.W. 2d 640 (TEX. 1995) SHOULD HAVE BEEN APPLIED IN DECIDING THIS CASE.

ADDITIONALLY TO DECIDE WHETHER PETITIONER'S WAS DENIED DUE PROCESS OF LAW RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN THE COURT OF APPEALS FAILED TO CONSIDER ALL THE ARGUMENT MADE IN PETITIONERS BRIEF AND AFFIRMED TRIAL COURTS JUDGEMENT FOR THE WRONG REASON.

THE QUESTION PRESENTED IS OF GREAT IMPORTANCE TO THE STATES JURISPONDENCE THAT IT REQUIRES THIS COURTS REVIEW AND GUIDANCE ON THE QUESTIONS.

PRAYER

WHEREFORE, FOR ALL THE FOREGOING REASONS, PETITIONER JOHN ADI PRAYS THAT THIS HONORABLE SUPREME COURT GRANT A REVIEW IN THIS CASE.

RESPECTFULLY SUBMITTED,

_____

JOHN ADI, 878039
3872 FM. 350 SOUTH
LIVINGSTON, TEXAS 77351
PETITIONER PRO SE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING PETITION FOR REVIEW HAS BEEN SERVED THROUGH U.S. MAIL FIRST CLASS PRE-PAID POSTAGE TO TROY A. WILLIAMS, 400 TWO ALLEN CENTER, 1200 SMITH ST. HOUSTON, TEXAS 77002 ON NOVEMBER 12, 2004.

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JOHN ADI
PETITIONER PRO SE.

APPENDIX TO PETITION FOR REVIEW

EXHIBITS:

A. MEMORANDUM OPINION DATED JULY 1, 2004. JOHN ADI V. DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. CAUSE NO. 01-03-00067-04 AND JUDGMENT OF THE COURT.

B. TRIAL COURT JUDGMENT IN CAUSE NUMBER 2002-30420 DATED SEPTEMBER 19, 2002 GRANTING SUMMARY JUDGMENT

C. COURT OF APPEALS ORDER DENYING MOTION FOR REHEARING IN CAUSE NUMBER 01-03-00067-04 DATED AUGUST 26, 2004

D. MOTION FOR LEAVE OF COURT TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND TRIAL COURT ORDER DENYING SAID MOTION DATED SEPTEMBER 19, 2002

E. SUPREME COURTS ORDER GRANTING OF TIME TIL NOVEMBER 12, 2004 IN CAUSE NO. 04-0895 DATED OCTOBER 11, 2004

EXHIBIT A

Opinion issued July 1, 2004

In The
Court of Appeals
For The
First District of Texas

NO. 01-03-00063-CV

JOHN ADI, Appellant

V.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND DAN BROWN, Appellees

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On Appeal from the 61st District Court
Harris County, Texas Trial Court Cause No. 2002-30420

MEMORANDUM OPINION

On June 14,2002, appellant, John Adi, sued appellees, Prudential Property and Casualty Insurance Company, a subsidiary of the Prudential Insurance Company of America (Prudential), and Dan Brown, for defamation of character arising out of statements made by Brown. Brown made the statements, within the scope of his employment as a Prudential agent, to two other Prudential employees. The trial court granted summary judgment in favor of appellees, dismissing Adi's defamation claim. We determine whether the trial court erred by (1) denying Adi's motions for leave of court (a) to file late pleadings and (b) to file his first amended petition; (2) denying Adi's objections to and motion to strike appellees' summary judgment evidence; (3) granting appellees' motion for summary judgment on the basis of res judicata, substantial truth, or lack of injury; and (4) denying Adi's motion for new trial. We affirm.

Background

While Adi was the president and administrator of Bethsaida Medical Services, Inc. (Bethsaida), he and another individual were the subjects of an investigation by the Texas Department of Insurance (TDI). At TDI's request, Prudential issued a pretext insurance policy as part of a sting operation to uncover insurance fraud. In connection with the sting operation, Kelley Liesman, a TDI employee, telephoned Brown and made the

allegedly defamatory statements.[1] Brown allegedly repeated the statements to two other Prudential employees. As a result of the sting operation, Adi was arrested, convicted, and sentenced to 70 years in prison, which sentence he is currently serving.

Appellees moved for summary judgment on Adi's defamation claim on July 19, 2002, on the basis of res judicata, substantial truth, and lack of injury. The trial court granted appellees' summary judgment motion on September 19,2002. It is from that order that Adi now appeals.

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[1] Adi asserts that Liesman told Brown that "[a]gents were sent to Bethsaida ... where very minimal treatments were given that were in fact unneeded." Adialso claims that Liesman stated that "[o]n 1-29-98, attorney Reginald Ike, his office staff, and the administrator of the medical clinic were arrested by the fraud unit and are being charged with insurance fraud, a third degree felony." In a prior lawsuit, Adi sued Prudential and Brown for defamation based on a claims note that Brown had written containing virtually the same statements about Adi's arrest. *See Adi v. Prudential Prop. & Cas. Ins. Co.*, No. 14-01-01001-CV (Tex. App.—Houston [14th Dist.] Dec. 11, 2003, pet. denied).

Motions for Leave to File Documents

A. Request for Leave to File a Late Response and Objections

In his first point of error, Adi contends that the trial court erred by denying his motion for leave to file his late response and objections to appellees' motion for summary judgment.

Although Adi argues that the trial court erred in denying his motion for leave to file a response and objections late, he asserted in his motion that it was being filed merely "should there be any delay in getting these documents on time to the court even though they were file[d] . . . more than seve[n] days before the hearing." On appeal, Adi claims that his response and objections were in fact timely, implying, as his motion for leave expressly stated, that his motion for leave had been filed merely out of an abundance of caution.

It is uncontroverted that Adi's response and objections reflect a postmark of August 12, 2002 and that the district clerk filed them on August 15, 2002. The summary judgment hearing was set for August 19, 2002. A non movant must file his response to a motion for summary judgment not later than seven days prior to the day of hearing. TEX. R. CIV. P. 166a(c). Because Adi mailed his response and objections before the last day that he was required to do so and because they were received by the clerk's office not later than 10 days after the due date, he timely filed his response and objections. *See* TEX. R. CIV. P. 5, 166a(c); *see also E.B. Smith Co. v. United States Fid. & Guar. Co.*, 850 S.W.2d 621, 622-23 (Tex. App.—Corpus Christi 1993, writ

denied) (applying Texas Rule of Civil Procedure 5 to summary judgment response).

Because Adi did not file his response late, his motion for leave to file a late response was unnecessary, and the trial court's denial of Adi's motion did not nullify his response. Furthermore, nothing in the record indicates that the trial court did not consider Adi's response prior to granting appellees' summary judgment motion. Accordingly, we hold that the trial court did not err by denying Adi's motion for leave to file a late response and objections.

We overrule Adi's first point of error.

B. Request for Leave to File First Amended Original Petition

In his seventh point of error, Adi asserts that the trial court erred in denying his motion for leave to file his first amended original petition.

Texas Rule of Civil Procedure 63 allows a party to amend his pleadings.[2] TEX. R. Civ. P. 63; *see Goswami v.*

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[2] Rule 63 states:

> Parties may amend their pleadings ... and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any pleadings ... offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166,

Metro. Sav. & Loan Ass 'n, 751 S. W.2d 487,490 (Tex. 1988) (asserting that rule 63 applies to summary judgments). Adi filed his motion for leave to file an amended petition on August 1, 2002. The record shows that his amended petition was also filed with the trial court on the same date.[3] The summary judgment hearing was set for August 19, 2002. Because there was no court order asserting that amendments had to be filed before August 1, and because the hearing was more than seven days away, it was not necessary for Adi to request leave to file his amended pleading. *See* TEX. R. CIV. P. 63. However, there is also no indication in the record that the trial court denied Adi's motion for leave to file an amended petition.[4]

The amended pleading is part of the record, and there is no basis on which to conclude that the trial court did not consider Adi's amended pleading. Under

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> shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

TEX. R. Civ. P. 63.

[3] Adi's amended petition was virtually identical to his original petition.

[4] Adi appears to indicate in his brief that the trial court overruled his motion bygranting appellees' summary judgment motion, but the summary judgmentorder does not discuss whether the trial court considered Adi's motion oramended pleading.

these circumstances, leave of court to file the pleading, although unnecessary in this case, is presumed. *See Goswami*, 751 S.W.2d at 490.

We overrule Adi's seventh point of error.

Summary Judgment Evidence

In Adi's second and third points of error, he argues that the evidence supporting appellees' summary judgment motion is incompetent and, thus, that the trial court erred by denying his motion to strike such evidence and by granting summary judgment.

The admission and exclusion of evidence is committed to the trial court's
sound discretion. *City of Brownsville* v. *Alvarado*, 897 S.W.2d 750,753 (Tex. 1995). A trial court abuses its discretion when it acts without regard for any guiding rules or principles. *Downer* v. *Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was calculated to cause, and probably did cause, the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(l); *Alvarado*, 897 S.W.2d at 753.

Adi asserts that appellees' exhibits F and G attached to their motion for summary judgment were not competent proof because they were irrelevant, hearsay, and improperly certified. Exhibit F was a copy of a capias and indictment relating to Adi's arrest for

engaging in organized criminal activity and identifying his prior conviction for the felony offenses of "False Statement in Acquisition of Firearms, Dealing in Firearms without a license, and False Statement to a Grand Jury." Exhibit G was a copy of the judgment finding Adi guilty of engaging in organized criminal activity and sentencing him to 70 years in prison.

Adi argues first that exhibits F and G were not competent summary judgment proof because they were improperly certified. It is uncontroverted that both of these exhibits bore the stamp of the Harris County District Clerk's office, including the official seal of the clerk's office and the signature of a deputy clerk. However, both documents also included a date stamp indicating the date of certification as June 4, 1996. Because these exhibits were all created more than a year after the date stamped on the certification, Adi argues that the certification was void. We disagree.

The exhibits in question were public records. *See Stephens v. Dolcefino*, 126 S.W.3d 120, 137-38 (Tex. App.—Houston [1st Dist.] 2003, pet. filed) (recognizing that indictment relied on in another case constituted public record). As such, they were generally admissible as an exception to the hearsay rule. *See* TEX. R. EVID. 803(8). Under Texas Rule of Evidence 902, domestic public documents, such as exhibits F and G, are self-authenticating.[5] *See* TEX. R. EVID. 902(1). The

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[5] Texas Rule of Evidence 902 states:

Extrinsic evidence of authenticity as a condition precedentto admissibility is not required with respect to thefollowing:

certification of the copies of these exhibits was sealed and contained the signature of a deputy clerk from the Harris County District Clerk's office, as required by the Texas Rules of Evidence. *See* TEX. R. EVID. 902(1), (4). The rales do not specify that the certification contain an accurate date, and there is nothing in the record to indicate that the incorrect date stamp was the result of a fraudulent act. Consequently, it was not an abuse of discretion for the trial court to admit exhibits F and G under the public documents exception to the hearsay rule.

Adi next asserts that exhibits F and G were not competent summary judgment evidence because they were too remote in time to have had any relevance to the allegedly defamatory statements. However, these documents were relevant to appellees' defense of substantial truth of the allegedly defamatory statements. The fact that they were created months after the allegedly defamatory statements were made does not render them irrelevant, as they addressed the substantial truth of those statements. Consequently, the trial court did not abuse its discretion in admitting exhibits F and G as evidence.

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(1) Domestic Public Documents Under Seal. Adocument bearing a seal purporting to be that of the UnitedStates, or of any State, district, Commonwealth, territory . . . or of a political subdivision, department, officer, oragency thereof, and a signature purporting to be anattestation or execution.

TEX. R. EVID. 902(1).

Because we conclude that exhibits F and G are the only documents that were necessary to support appellees' motion for summary judgment based on the affirmative defense of substantial truth, we need not address the trial court's rulings on the admissibility of the other exhibits of which Adi complains. *See Aharado*, 897 S.W.2d at 753 (asserting that successful challenge to evidentiary rulings usually requires complaining party to show that judgment turns on particular evidence excluded or admitted).

Accordingly, we overrule Adi's second and third points of error.

Substantive Claims

In Adi's fourth, fifth, sixth, and ninth points of error, he claims that the trial court erred in granting summary judgment based on the defenses of substantial truth, res judicata, and lack of injury.

Appellees moved for traditional summary judgment under Texas Rule of Civil Procedure 166a(c). *See* TEX. R. CIV. P. 166a(c). A defendant is entitled to summary judgment under this rule if the evidence disproves as a matter of law at least one element of each of the plaintiff's causes of action or if the defendant conclusively establishes all elements of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

In reviewing the granting of a motion for summary judgment, we consider as true all the

evidence that favors the non movant. *Watts v. Hermann Hosp.*, 962 S.W.2d 102, 104 (Tex. App.—Houston [1st Dist.] 1997, no pet.). We indulge every reasonable inference in favor of the non movant and resolve all reasonable doubts in its favor. *Cont'l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988); *Watts*, 962 S.W.2d at 104. When, as here, an order granting summary judgment does not specify the grounds upon which the trial court ruled, we must affirm to the extent that any of the summary judgment grounds is meritorious. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471,473 (Tex. 1995).

To maintain a defamation cause of action, the plaintiff must prove that the defendant (1) published a false statement about the plaintiff, (2) that statement was defamatory, and (3) that the defendant made the statement while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. *SeeAssoc.. Press v. Cook*, 17 S.W.3d 447, 452 (Tex. App.—Houston [1st

Dist] 2000, no pet). A showing of substantial truth, however, will defeat a defamation claim. *See McIlvain v. Jacobs,* 794 S.W.2d 14, 15-16 (Tex. 1990). Because substantial truth is an affirmative defense, a defendant must conclusively establish each element to be entitled to summary judgment. *See Cathey,* 900 S.W.2d at 341. To determine substantial truth, we consider whether the defamatory statement is more damaging to the plaintiff in the mind of the average listener than a true statement would have been. *McIlvain,* 794 S.W.2d at 16; *Barbouti* v. *Hearst Corp.,* 927 S.W.2d 37, 65 (Tex. App.—Houston [1st Dist.] 1996, writ denied). This evaluation involves looking at the "gist" of the statements. *Cook,* 17 S.W.3d at 452. If the underlying facts as to the gist of the libelous charge are undisputed, then we disregard any variance with respect to items of secondary

importance and determine substantial truth as a matter of law. McIlvain, 794 S.W.2d at 16; Cook, 17 S.W.3d at 452.

Adi contends that there are material issues of fact concerning whether (1) he was arrested on January 29, 1998, (2) he was charged with insurance fraud, and (3) Brown's statements were substantially true. After talking to TDI employee Liesman, Brown told two Prudential employees that Adi had been arrested by the fraud unit on January 29, 1998 and that Adi was being charged with insurance fraud, a third-degree felony. Appellees' summary judgment evidence showed that Adi was arrested in March of 1998 and subsequently charged with, and convicted of, engaging in organized criminal activity, a second-degree felony.

Adi asserts that the statements made by Brown were false, and would be more damaging to Adi's reputation in the mind of the average recipient than a truthful statement of "no such arrest, and no such charged filed on [Adi] on January 29, 1998." Although Brown's statements were not absolutely accurate, the summary judgment evidence showed that, several weeks after Brown's statements, Adi was arrested in connection with activities stemming from the insurance-fraud sting operation. Even though Adi was not charged with insurance fraud, as Brown stated, the summary judgment evidence showed that Adi was charged with and convicted of a more serious felony. As Adi acknowledges in his brief, the allegedly

defamatory statement need not be literally true; rather substantial truth is sufficient. *See ABC, Inc. v. Shanks,* 1 S.W.3d 230, 235 (Tex. App.—Corpus Christi 1999, pet. denied). The gist of Brown's statements was that Adi was charged with a felony in connection with the insurance-fraud sting operation. If anything, the statements would seem less damaging to an average listener than the actual truth, considering that Brown claimed that Adi was charged with a less serious offense. Moreover, the fact that Adi was actually arrested in March and not in January is of secondary importance to the gist of the statements and thus can be disregarded. *See Cook,* 17 S.W.3d at 452. As a result, appellees proved the substantial truth of Brown's statements as a matter of law.

Because we have determined that appellees were entitled to summary judgment on the basis of substantial truth, we need not address the merits of appellees' other bases for summary judgment. Accordingly, the trial court did not err in granting appellees' motion for summaryjudgment. We overrule Adi's fourth, fifth, sixth, and ninth points of error.

Motion for New Trial

In his eighth point of error, Adi contends that the trial court eiTed by denying his motion for new trial. A trial court has broad discretion to deny or to grant a mofion for new trial, and the trial court's discretion will not be disturbed on appeal absent a showing of a manifest abuse of that discretion. *Batra* v. *Clark,* 110 S.W.3d 126, 128 (Tex. App.—Houston [1st Dist] 2003, no pet.).

Adi's contentions in his motion for new trial merely reiterate the arguments that Adi has presented in his appellate brief, namely, that the trial court erred by denying various motions, by admitting appellees' exhibits, and by granting summary judgment. We have affirmed the trial court's summary judgment. Accordingly, the trial court did not abuse its discretion by denying Adi's motion for new trial.

We overrule Adi's eighth point of error.

Conclusion

We affirm the judgment of the trial court. All pending motions are denied as moot.

/s/ Tim Taft

Justice

Panel consists of Justices Taft, Hanks, and Bland.

Court of Appeals
First District of Texas

JUDGMENT

JOHN ADI, APPELLANT

NO. 01-03-00063-CV V.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND DAN BROWN, APPELLEES

Appeal from the 61st District Court of Harris County, Texas. (Tr. Ct. No. 2002-30420)

Panel consists of Justices Taft, Hanks, and Bland. Opinion delivered by Justice Taft

The cause heard today by the Court is an appeal from the order signed by the court below on September 19, 2002. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was no reversible error in the judgment. It is, therefore, **CONSIDERED, ADJUDGED,** and **ORDERED** that the judgment of the court below be, in all things, **affirmed.**

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Taft, Hanks, and Bland.

Judgment rendered July 1, 2004.

EXHIBIT B

NO. 2002-30420

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

JOHN ADI

v.

DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY

61st JUDICIAL DISTRICT

SUMMARY JUDGMENT ORDER

On this day, came on to be heard the Motion for Summary judgment of Defendants DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. The Court, after reviewing the pleadings and considering the evidence presented is of the opinion and finds that the above named Defendants are entitled to Summary Judgment as to Plaintiff JOHN ADI's claims as follows:

It is ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff JOHN ADI's causes of action against Defendants DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY are DISMISSED (with prejudicial costs of Court to be paid by Plaintiff. Any and all relief not specifically granted herein is denied).

/s/_____

JUDGE PRESIDING

EXHIBIT C

Court of Appeals
First District
1307 San Jacinto Street, 10th Floor
Houston, Texas 77002-7006

SHERRY RADACK
CHIEF JUSTICE

TIM TAFT
SAM NUCHIA
TERRY JENNINGS
EVELYN KEYES
ELSA ALCALA
GEORGE C. HANKS, JR.
LAURA CARTER HIGLEY
JANE BLAND
JUSTICES

MARGIE THOMPSON
CLERK

JANET MCVEA WILLIAMS
CHIEF STAFF ATTORNEY
M. KARINNE MCCULLOUGH
COURT ADMINISTRATOR

PHONE: 713-655-2700
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August 26, 2004

John Adi
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Livingston, TX 77351

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Troy A. Williams
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Houston, TX 77002-4708

RE: Court of Appeals Number: 01-03-0063-CV
Trial Court Case Number: 0230420

Style: John Adi
v.
Dan Brown & Prudential Ins. Co. of America, et al

The Court today, **DENIED** the appellant's *pro se* motion for rehearing with suggestion of rehearing en banc in the above referenced case.

Respectfully yours,
Margie Thompson, Clerk

/s/ Michelle Meuhlen
Michelle Meuhlen, Deputy Clerk

EXHIBIT D

CAUSE NO. 2002-30420

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

61st JUDICIAL DISTRICT

JOHN ADI

v.

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

MOTION FOR LEAVE OF COURT TO FILE PLAINTIFFS LATE RESPONSE & OBJECTIONS TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW JOHN ADI, PLAINTIFF IN THE ABOVE STYLED AND NUMBERED CAUSE MOVES FOR LEAVE OF COURT TO FILE PLAINTIFF'S LATE OBJECTIONS AND RESPONSE TO THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT THEREOFF WOULD SHOW THE COURT AS FOLLOWS

I

PLAINTIFF JOHN ADI HAS ON AUGUST 10, 2002 FILED THROUGH THE U.S. MAIL FIRST CLASS CERTIFIED MAIL # 7001 2510 0009 1640 2442

- PLAINTIFFS OBJECTIONS AND RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT
- AFFIDAVIT OF JOHN ADI IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT
- PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS SUMMARY JUDGMENT EXHIBITS
- PROPOSED ORDER DENYING DEFENDANTS MOTION FOR SUMMARY JUDGMENT EXHIBITS

II

PLAINTIFF REQUEST THIS LEAVE OF COURT TO FILE THESE DOCUMENTS SHOULD THERE BE ANY DELAY IN GETTING THESE DOCUMENTS ON TIME TO THE COURT EVEN THOUGH THEY WERE FILED TODAY AUGUST 10, 2002 THROUG THE MAIL WHICH IS MORE THAN SEVE DAYS BEFORE THE SCHEDULED HEARING SET FOR AUGUST 19, 2002.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF JOHN ADI, RESPECTFULLY PRAYS THAT THIS MOTION FOR LEAVE OF COURT TO FILE LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

RESPECTFULLY SUBMITTED,

/s/ John Adi
JOHN ADI, PLAINTIFF, PRO Se

CERTIFICATE OF SERVICE

I CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING MOTION FOR LEAVE OF COURT TO FILE PLAINTIFFS LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT HAS BEEN FORWARDED TO ALL COUNSEL OF RECORD BY U.S. MAIL FIRST CLASS PRE PAID POSTAGE ON 10TH DAY OF AUGUST 2002.

/s/ John Adi
JOHN ADI, PRO Se

CAUSE NO. 2002-30420

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 61st JUDICIAL DISTRICT

JOHN ADI

v.

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

ORDER DENYING PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS SUMMARY JUDGMENT EXHIBITS

ON THIS DAY, CAME TO BE HEARD PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO **STRIKE** DEFENDANTS SUMMARY JUDGMENT EXHIBITS. THE COURT, AFTER REVIEWING THE PLEADINGS AND CONSIDERING THE EVIDENCE PRESENTED IS OF THE OPINION AND FINDS THAT PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS EXHIBITS (A-G) IS DENIED.

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT THAT PLAINTIFFS OBJECTIONS AND MOTION TO STRIKE IS DENIED.

DATE: SEPTEMBER 19, 2002

_/s/_____
JUDGE PRESIDING

VERIFICATION

I JOHN ADI TDCJ# 878039 BEING PRESENTLY INCARCERATED IN GARRA WEST UNIT OF TEXAS DEPARTMENT OF CRIMINAL JUSTICE INSTITUTIONAL DIVISION IN BEE COUNTY, TEXAS VERIFY AND DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON THIS THE 10TH DAY OF AUGUST, 2002.

/s/ John Adi

_____

JOHN ADI TDCJ 878039

ORDER

ON THIS THE _____ DAY OF ____, 2002, CAME TO BE HEARD PLAINTIFFS MOTION FOR LEAVE OF COURT TO FILE LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND THE COURT HAVING CONSIDERED THE SAME IS OF THE OPINION THAT SAID MOTION SHOULD BE IN ALL THINGS DENIED.

SIGNED SEPTEMBER 19, 2002

_____

JUDGE PRESIDING

EXHIBIT E

THE SUPREME COURT OF TEXAS

Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

October 11, 2004

Mr. John Adi
T.C.D.J. # 878039
3872 FM. 350 South
Livingston, TX 77351

Mr. Troy Allen Williams
Hays McConn Rice & Pickering
1200 Smith Street, Suite 400
Houston, TX 77002

RE: Case Number: 04-0895
Court of Appeals Number: 01-03-00063-CV

Style: JOHN ADI
v.
DAN BROWN, AND PRUDENTIAL PROPERTY AND CASIALTY INSURANCE COMPANY OF AMERICA

Dear Mr. John Adi:

Today the Supreme Court of Texas granted the motion for extension of time to file petition for review under the TEX. R. APP. P. 53.7(f) in the above-referenced case. The petition for review is due to be filed no later that 3:00 p.m., **November 12, 2004.**

Sincerely,
/s/ Andrew Weber
Andrew Weber, Clerk

By Nancy J. Vega, Chief Deputy Clerk
Cc: Ms. Margie Thompson

JOHN ADI
878039
3872 FM 350 SOUTH
LIVINGSTON, TX 77351

November 12, 2002

MR ANDREW WEBER
CLERK OF THE COURT
SUPREME COURT OF TEXAS
P.O. BOX 12248
AUSTIN, TEXAS 78711

RE: CASE NUMBER: 04-0895
COURT OF APPEALS NUMBER: 01-03-0063-04
TRIAL COURT NUMBER: 2002-30420

STYLE: JOHN ADI V. DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY OF AMERICA.

DEAR MR WEBER:

ENCLOSED HEREWITH FOR FILING IN THE ABOVE REFERENCED CAUSE IS ORIGINAL COPY OF MR ADI'S PETITION FOR REVIEW. PLEASE FILE IT AND PRESENT IT TO THE COURT.

THANKS FOR YOUR ASSISTANCE IN THIS MATTER.

SINCERELY,
/s/ John Adi

JOHN ADI
PETITIONER PRO Se